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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

Southern Pacific Communications Company (Southern Pacific), a party intervenor to the proceedings in the United States Court of Appeals for the Ninth Circuit whose judgment is sought to be reviewed, respectfully submits this brief in opposition to the petition of the National Association of Regulatory Utility Commissioners (NARUC) for a writ of certiorari in the above-entitled proceeding.

OPINIONS BELOW

The First Report and Order of the Federal Communications Commission (the Commission) is reported at 29 F.C.C.2d 870 (1971), and appears as petitioner's Appendix C (Pet. App. C). The Commission's Memorandum Opinion and Order denying reconsideration is reported at 31 F.C.C.2d 1106 (1971), and appears as petitioner's Appendix D (Pet. App. D). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 573 F.2d 1142 (1975), and appears as petitioner's Appendix A (Pet. App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1975. A petition for rehearing was denied by the Court of Appeals (Pet. App. B) on March 12, 1975. The petition for a writ of certiorari was filed on June 9, 1975. The time for all non-Federal respondents to file a response to the petition was extended by the Clerk to and including July 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commission acted within its authority in adopting a general policy in a rule making proceeding that the public interest would be served by permitting the entry of competing new carriers in the field of specialized communications services, on the basis of more than 200 comments and reply comments, oral argument before the Commission en banc, and detailed factual determinations, forecasts, and expert judgments.

2. Whether the subsequent institution by the Commission of a fact finding inquiry into the economic implications and interrelationships of pricing practices and regulatory policies, required reversal of the Commission's determination in an extensive rule making proceeding that the anticipated beneficial effects from the entry of competing specialized carriers outweighed any possible adverse effects of competition upon existing carriers and their services.

3. Whether the failure of the Commission to discuss environmental impact in adopting a general policy extending competition in the field of specialized communications services required reversal, where none of the numerous parties participating in the general rule making proceeding had raised the issue before the Commission, and the issue was deemed by the Court of Appeals to be too insubstantial, and disruptive of the administrative process, to be considered for the first time on appeal.

STATEMENT OF THE CASE

In 1969, after an evidentiary hearing commenced six years earlier, the Commission authorized a new common carrier to provide specialized communications common carrier private line service [1] between St. Louis

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[1] Specialized common carriers are engaged in the transmission of communications (voice, data, or both), between intercity locations by full-time dedicated private circuits giving their customers continuous communications without requiring the carriers to establish a new connection for each call or message. See *Bell System Tariff Offerings*, 44 F.C.C.2d 245 (1973), 46 F.C.C.2d 413, 416 (1974), affirmed *Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), petition for certiorari denied, *AT&T* v. *FCC*, 43 U.S.L.W. 3654 (June 16, 1975), petition for rehearing pending.

and Chicago in competition with the Bell System and The Western Union Telegraph Company.[2] After a large number of applications were thereupon filed by various companies to construct and operate microwave radio and other facilities to provide specialized communications services, particularly for data transmission,[3] the Commission instituted a rule making proceeding to formulate policy and to establish rules with respect to the specific issues, including particularly [4]

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and, if so,
>
> B. Whether comparative hearings on the various claims of economic mutual exclusivity among the applicants are necessary or desirable in the circumstances * * * .

More than 200 comments and reply comments were filed by interested partics, including the Department of Justice and the Small Business Administration,[5]

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[2] *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

[3] As of March 15, 1971, 33 applicants had submitted 46 separate proposals for the operation of 1877 microwave stations. First Report and Order, *Specialized Common Carrier Inquiry*, 29 F.C.C. 2d 870, 871 fn. 1 (1971) (Pet.App. 50a), reconsideration denied, 31 F.C.C.2d 1106 (1971) (Pet.App. 189a), affirmed *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142, 1145 fn. 1 (9th Cir. 1975) (Pet.App. 2a), petition for writ of certiorari pending, *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 74-1550.

[4] Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order, *Specialized Common Carrier Inquiry*, 24 F.C.C.2d 318, 327 (1970).

[5] See Appendix B to First Report and Order listing participating parties, Note 3 supra, 29 F.C.C.2d at 945-949.

and oral argument was presented before the Commission en banc on behalf of more than 30 parties over two days.

In an extensive First Report and Order,[6] the Commission carefully reviewed and considered the various contentions and materials submitted by the parties, including specifically the new, diverse, and improved services and benefits to be realized by the entry of additional competing specialized carriers, weighed against the possible adverse effects of competition upon existing carriers and their services,[7] and on the basis of various subsidiary factual determinations, forecasts, and expert judgments detailed in its report [8] unanimously reached the following ultimate findings and conclusion: [9]

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

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[6] Note 3 supra. The First Report and Order covers 144 pages in petitioner's Appendix, pp. 48a-188a.

[7] Note 3 supra, 29 F.C.C.2d at 910-914 (Pet.App. 131a-138a), 513 F.2d at 1159 (Pet.App. 25a).

[8] Note 3 supra, 513 F.2d at 1156 (Pet.App. 20a).

[9] Note 3 supra, 29 F.C.C.2d at 920 (Pet.App. 147a-148a).

The Commission also concluded that it would be contrary to the public interest and inconsistent with its policy determination in favor of entry to attempt generally to limit entry among pending applicants by holding comparative hearings on issues of economic exclusivity.[10]

On reconsideration, the Commission rejected "the somewhat novel, but legally dubious, claim" of the National Association of Regulatory Utility Commissioners (NARUC), petitioner herein, that the Commission should pursue a policy of generating excess interstate earnings which should be applied to subsidize the revenue requirements applicable to local exchange services subject to state regulatory jurisdiction:[11]

> The Commission fully appreciates the objective of the NARUC to minimize the rates and revenue requirements of the telephone companies applicable to intrastate local services. We do not believe, however, that either as a matter of law or practice, this can be accomplished by arbitrarily inflating the cost of service subject to Federal jurisdiction and deflating by like amount the costs applicable to services subject to state jurisdiction. The allocation of joint costs incurred in furnishing telephone services subject to both Federal and state jurisdiction is, of course, a complex and at times controversial matter. Nevertheless, it is incumbent upon Federal and state rate-making authorities, as a matter of law to employ allocation procedures which will fairly and reasonably reflect the legitimate costs of each service. See *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *Minnesota Rate Cases*, 230 U.S. 352 (1913). Allocations cannot and should not be designed to artificially shift any part of the revenue requirement applicable to one jurisdiction into another. This, clearly, would lead to confusion, if not chaos, in maintaining a system of dual Federal/State regulation on a rational and manageable basis. As the NARUC is well aware, procedures and mechanisms are available and have been employed over the years on a cooperative Federal/State basis as a means of establishing and maintaining fair and equitable jurisdictional allocations. This proceeding is not the appropriate forum to address that subject.

[10] Note 3 supra, 29 F.C.C.2d at 923 (Pet.App. 153a).

[11] Note 3 supra, 31 F.C.C.2d at 1108 (Pet.App. 192a-193a).

Petitions for review were filed by the Washington Public Utilities Commission and NARUC, but not by the Bell System or by Western Union. While the petitions for review were pending, the Commission in August, 1972, issued a notice of proposed rule making to implement the National Environmental Policy Act of 1969 (NEPA),[12] and in December, 1974, issued a report and order adopting rules and regulations in which it identified enumerated types of facilities considered to be major and required that information relating to such facilities be submitted to the Commission with applications for construction permits after January 20, 1975, so that environmental impact statements might be required where the environmental consequences were considered to be significant.[13]

[12] Notice of Proposed Rulemaking, *Implementation of the National Environmental Policy Act of 1969*, 36 F.C.C.2d 108 (1972).

[13] Report and Order, 49 F.C.C.2d 1313 (1974). Microwave antenna towers over 100 feet, but other towers over 300 feet, are considered major facilities. The Commission is giving consideration to the disparity in treatment of tower heights. 50 F.C.C.2d 814 (1975).

In April, 1974, the Commission instituted an inquiry "into the effect of current pricing practices and regulatory policies on the level and distribution of customer charges for various telecommunications services, and in particular on the extent to which various categories of customers are now or will be under alternative pricing practices and regulatory policies subsidizing the services required by others."[14] In the notice of inquiry, and later in a memorandum opinion and order[15] and in a first supplemental notice,[16] the Commission emphasized that the purpose of the inquiry was to gather information, views, and comments from interested persons for the benefit of the Commission, state utility commissions, regulated carriers, and others, as primarily a fact-finding inquiry, and that it was not proposing in the particular proceeding to adopt any rules or policies, as such.

The United States Court of Appeals for the Ninth Circuit issued its opinion and judgment on January 20, 1975,[17] holding that petitioners had standing to bring petitions for review, but affirming in all respects that the Commission had met the substantive and procedural requirements of the Communications Act of 1934, as amended, in weighing the asserted benefits and possible adverse effects of competition, and in proceeding by rule making to determine policy; that the

[14] Notice of Inquiry, *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate-Structures,* 46 F.C.C. 2d 214 (1974).

[15] 49 F.C.C.2d 1238 (1974).

[16] 50 F.C.C.2d 574 (1974).

[17] Note 3 *supra* (Pet.App. A).

Commission had properly given careful consideration to the relevant factors in concluding that comparative hearings for the applicants were neither necessary nor desirable; and that in the particular circumstances of this case, the balance should be struck against review and reversal because the Commission had not considered the environmental impact of its policy, a matter raised for the first time on appeal.

ARGUMENT

1. Contrary to NARUC's contention, the Commission's policy determination in this case to permit the entry of new carriers in the field of specialized communications is not in conflict with this Court's ruling in *FPC* v. *Texaco, Inc.*,[18] holding that a regulatory agency cannot place exclusive reliance on the prevailing price in the marketplace to determine whether rate are "just and reasonable" under its statutory mandate.

In the *Texaco* case, this Court held that an FPC order which provided a blanket certificate procedure for small producers of natural gas was too ambiguous because it did not disclose the basis of its order with sufficient clarity. The FPC had not exercised its discretion to insure that the sales price for the gas would be "just and reasonable" as mandated by the applicable statute.[19] For the purpose of the proceedings that might occur on remand, this Court stressed that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates", inasmuch as the Congress had subjected producers to regulation

[18] 417 U.S. 380 (1974).

[19] 417 U.S. at 395-397.

because it had recognized the anticompetitive conditions in the industry.[20]

The *Texaco* case is completely inapposite here. As the Court below recognized, the Commission was fully conscious of the guidelines announced by this Court in the *Three Circuits* case, *FCC* v. *RCA Communications Inc.*,[21] concerning the weight to be given competitive considerations, and sought conscientiously to follow them in concluding that the reasonable expectation of some beneficial effects from the new entry outweighed the possible adverse effects of competition upon existing carriers and services.[22] By no means did the Commission thereby abdicate its regulatory functions to the marketplace. Unlike the FPC in the *Texaco* case, which merely asserted in generalities that it "shall consider all relevant factors",[23] this Commission specifically and in express detail weighed all the relevant considerations in reaching its conclusions, including the nature and extent of the potential market, the public need and demand for the specialized new and improved services by diverse and flexible means offered by the new carriers, and the insubstantial effect of the new entry upon the resources, revenues, and services

[20] 417 U.S. at 397-399.

[21] 346 U.S. 86 (1953).

[22] Note 3 supra, 513 F.2d at 1159 (Pet.App. 23a). The Third Circuit has also ruled that the Commission's First Report and Order in the *Specialized Common Carrier Inquiry* "fully comports with the principles articulated in RCA. * * * We regard the listing of factors (independent of competition) and the identification of benefits (reasonably expected) as proof that the FCC viewed competition as a means, rather than as a goal in and of itself," in this proceeding. *Bell Tel. Co. of Pennsylvania* v. *FCC*, note 1 supra, 503 F.2d at 1271, 1272.

[23] Note 18 supra, 417 U.S. at 397.

of the existing established carriers.[24] The Commission pointed out that its disposition of the policy aspect did not constitute a determination that all or any of the pending applications will be granted, since each application must still meet the applicable statutory standards and comport with the Commission's established policies, and each applicant must make a satisfactory showing that it is qualified and the service it seeks to offer is technically and economically sound and otherwise in the public interest.[25] Thereafter, upon grant of its applications, each applicant becomes subject to the full sweep of Commission regulation over interstate carriers under the Communications Act of 1934, as amended.

Unlike *Texaco,* where the market was characterized by anticompetitive practices, and the Commission merely indicated in generalities that it intended to review new contract prices,[26] the Commission below particularized how its rate making and regulatory policies and practices would be appropriately adapted to promote and maintain an environment of free and open competition in the sale of specialized services.[27] Unlike *Texaco,* where the Commission was found to have placed *exclusive* reliance upon market factors, rather than considering the market to be one relevant factor to be taken into consideration,[28] the Commission below did consider many other factors beyond the

[24] Note 3 supra, 29 F.C.C.2d at 904-920 (Pet.App. 117a-147a).

[25] Note 3 supra, 29 F.C.C.2d at 900 (Pet.App. 110a-111a).

[26] Note 18 supra, 417 U.S. at 397-399.

[27] Note 3 supra, 29 F.C.C.2d at 915-917 (Pet.App. 139a-142a).

[28] Note 18 supra, 417 U.S. at 399, 400.

marketplace, and retained jurisdiction to examine the qualifications of each applicant and to review its procedures in the light of experience. It considered other factors such as the desirability of avoiding delay in the institution of services needed by the public now, the benefit to the public in the availability of diverse options, the lack of public detriment in the event some new carriers should fail, and the ability of the Commission to review the policy later in the light of changed circumstances, in concluding that it would be contrary to the public interest and inconsistent with its policy determinations to attempt generally to limit entry among pending applicants by holding comparative hearings on issues of economic exclusivity.[29]

2. NARUC is incorrect that the Commission's action in 1974 instituting an inquiry into the economic implications and interrelationships of current pricing practices and regulatory policies is in any wise inconsistent with the Commission's policy in favor of entry of new carriers. The notice of inquiry and the subsequent Commission memorandum opinion and order and supplemental notice do not in the least question the soundness of the First Report and Order in the *Specialized Common Carrier Inquiry*,[30] but to the contrary stress that the purpose of the inquiry is only to gather information, views, and comments from interested persons for possible future proceedings, but not to adopt any rules or policies, as such, in the particular proceeding.[31]

As the Court of Appeals below observed, "Against these benefits [of new entry], the Commission carefully

[29] 29 F.C.C.2d at 923-927 (Pet.App. 153a-160a).

[30] Note 3 supra.

[31] Notes 14-16 supra.

weighed possible adverse effects of competition upon existing carriers and their services (29 F.C.C.2d at 910-14) [Pet. App. 130a-138a] before finally concluding that a general policy of new entry would serve the public interest, convenience, and necessity."[32] NARUC's principal contention, that new entry would siphon off interstate revenues and earnings from the telephone companies used to subsidize local exchange service, was rejected by the Commission as "legally dubious", since "[a]llocations cannot and should not be designed to artificially shift any part of the revenue requirement applicable to one jurisdiction into another."[33] The fact finding inquiry into economic implications and interrelationships looks to the future, not to any reevaluation of the Commission's decision in the *Specialized Common Carrier Inquiry* to authorize the entry of new carriers into the field of specialized communications, and the inquiry is not designed or constituted so as to produce a reversal of the Commission's policy.

3. Finally, NARUC's contention that the Court of Appeals below was required to reverse the Commission's decision because the Commission had failed to consider the environmental impact of its policy under NEPA is wholly without substance. The Court of Appeals recognized that it could remand even though the issue had not been raised before the Commission, but it also recognized that any damage that might be done at the review stage to NEPA interests was "problematical and, in any event, slight"; that NARUC's claim of environmental impact did not ap-

[32] Note 3 supra, 513 F.2d at 1159 (Pet.App. 25a).

[33] Note 3 supra, 31 F.C.C.2d at 1108.

pear particularly substantial, since the basic question was who would furnish the service (the new or the established carriers), not whether it would be furnished, or how much; and that a resolution of the NEPA issue now would create great delay, waste, and expense outweighing any benefit from reviewing the NEPA question at this late stage.[34] The matter was well within the Court's discretion.

Significantly, despite the expressed concern of NARUC with the environmental impact of microwave operation, neither NARUC nor any Federal or State agency, including those expressly charged with environmental responsibilities, sought to challenge any of the specialized carrier applications pending before the administrative agency, where environmental considerations can be weighed in the context of the specific proposals for tower height, radiated power, site location, and other characteristics of the radio microwave stations to be constructed.

4. Contrary to NARUC's contentions (pp. 14-15), there are no issues presented here of great public importance or great precedential significance. The entry of the specialized carriers is unlikely to have any significant impact on telephone revenues—in the last calendar year, the total annual revenues of both the specialized and the domestic satellite carriers amounted to approximately $15 *million,* or less than 5/100 of one per cent of the $31.6 *billion* in total revenues of the telephone companies.[35] As the Commission pointed out

[34] Note 3 supra, 513 F.2d at 1167-1169.

[35] Remarks by Walter R. Hinchman, Chief, Common Carrier Bureau, Federal Communications Commission, before the 28th Annual Conference of the International Communications Association, San Francisco, California, May 16, 1975.

in its First Report and Order, even if the most sanguine expectations of the new carriers were realized, there is no reason to believe that there would be any substantial diversion of telephone revenues, or any significant adverse impact on telephone users, the installation of large capacity systems to meet growing requirements, or the realization of declining unit costs.[36] The insignificance of the NEPA issue can be seen from the circumstances that it did not occur to a single party filing the 200 pleadings before the Commission, and only to one of the petitioners for review; that the Commission after comprehensive consideration could see no need to establish an effective date before January 20, 1975; and that since the effective date of the new rules, it has played no significant role in the processing and grant of microwave radio applications.

The assertion of NARUC (p. 15) that the Commission's decision will fundamentally alter the structure of communications services to the public is without foundation. As the Commission observed, "we see no reason whatsoever to assume that the [specialized carrier] applications would divert all or even a substantial portion of that comparatively small percentage of existing and projected Bell System business that is vulnerable to competition."[37] The Commission's decision implements a continuing policy to foster competition in communications where it would serve some

[36] 29 F.C.C.2d at 912 (Pet.App. 83).

[37] Note 3 supra, 29 F.C.C.2d at 912 (Pet.App. 133a).

public benefit.[38] It should be noted that the implication of NARUC's position that the Bell System is the chosen instrument of domestic communications was also breached by the Commission's decision to permit competition in providing private line and even long distance telephone service by domestic satellite carriers, without challenge by NARUC.[39]

The assertions of NARUC, as the sole petitioner before this Court, must be measured against its primary interest in this litigation in promoting a policy of generating excess interstate earnings to be applied to subsidize local exchange revenue requirements, although the Commission has said that this proceeding is not the appropriate forum to address that subject.[40] To be noted is the absence of other petitioners with a public or private interest in the resolution of the proceeding, including any Federal or State agency charged with

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[38] E.g., international record common carrier services, *Mackay Radio and Telegraph Co.*, 19 F.C.C. 1321, 1334 (1955), affirmed *RCA Communications* v. *FCC*, 238 F.2d 24, 27-28 (D.C. Cir. 1956), certiorari denied, 352 U.S. 1004 (1957); transatlantic cables, *AT&T (TAT-4)*, 37 F.C.C. 1151, 1158-1159 (1957); *Domestic Satellite Service*, 42 F.C.C.2d 654 (1973); domestic mobile telephone service, *General Mobile Radio Service*, 13 F.C.C. 1190, 1218 (1949); private microwave use, *Allocation of Frequencies Above 890 Mc*, 27 F.C.C. 359, 412 (1959); data processing, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Service and Facilities*, 28 F.C.C. 2d 267 (1971), reconsideration denied, 34 F.C.C.2d 577 (1972), modified *GTE Service Corp.* v. *United States*, 474 F.2d 724 (2d Cir. 1973).

[39] *Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities*, 35 F.C.C.2d 844, reconsideration granted in part, 38 F.C.C.2d 665 (1972); *Network Project* v. *FCC*, 511 F.2d 786 (D.C. Cir. 1975).

[40] Note 3 supra, 31 F.C.C.2d at 1108 (Pet.App. 192a-193a).

public interest responsibilities, the established carriers themselves, including the Bell System, Western Union, or independent telephone companies, or any communications users or other members of the public. It is particularly noteworthy that although the standing of NARUC was accepted by the Court of Appeals as the representative of state regulatory agencies,[41] in two states where specialized carriers have sought state certificates of convenience and necessity to provide intrastate communications service, the Corporation Commission of the State of Oklahoma[42] and the Public Utilities Commission of the State of California[43] have both granted such certificates, with conditions, on the basis of the benefits to the public to be realized by the entry of competing carriers in meeting the growing demand for specialized communications services.

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[41] Note 3 supra, 513 F.2d at 1154-1155 (Pet.App. 16a-18a); *but see* concurring opinion of Circuit Judge Wallace rejecting this position, 513 F.2d at 1169-1171 (Pet.App. 45a).

[42] *In the Matter of the Application of United Video, Inc., a Corporation, for a Certificate of Convenience and Necessity to Operate a Telephone Company to Serve the Territory Within the Corporate Limits of the Cities of Tulsa and Oklahoma City, Oklahoma*, Cause No. 24892 (Okla.Corp.Comm. Nov. 14, 1974), petition in error pending (Okla.Sup.Ct. No. 48045). Southern Pacific is the successor in interest to the specialized carrier facilities of United Video, Inc.

[43] Interim Opinion, *Pacific Tel. & Tel. Co.* v. *Southern Pacific Communications Co.*, Case No. 9728 (Cal.PUC Decision No. 84167, March 4, 1975).

CONCLUSION

The petition for writ of certiorari should be denied.

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